UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: **VITAMINS ANTITRUST LITIGATION**	)	**MDL No. 1285** **Misc. No. 99-197. (TFH)**
This Document Relates To: **All Actions** **(except Class Actions)**	)	

ORDER OF SUMMARY JUDGMENT AGAINST ALL FEDERAL DAMAGE CLAIMS BASED ON THE "UMBRELLA" THEORY

It is hereby

ORDERED that Defendants' Motion for Summary Judgment against All Federal Damage Claims Based on the "Umbrella" Theory of Liability is **GRANTED**; it is further hereby

ORDERED that all claims for damages under Section 4 of the Clayton Act, 15 U.S.C. §15, based on plaintiffs' purchases from non-defendants and asserted pursuant to the "umbrella" theory of liability, are hereby dismissed.

SO ORDERED.

April 30, 2002

Thomas F. Hogan
Chief Judge

20287

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	
VITAMINS ANTITRUST LITIGATION	**MDL No. 1285**
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MEMORANDUM OPINION
Re: Defendants' Motion for Summary Judgment Against All Federal Damage Claims Based on the "Umbrella" Theory

Pending before the Court is defendants'[1] motion for summary judgment, pursuant to Fed. R. Civ. P. 56, seeking dismissal of plaintiffs' federal damage claims based on purchases made from defendants' competitors under the so called "umbrella" theory of liability.[2] Upon careful consideration of defendants' motion, plaintiffs' opposition, defendants' reply, and the entire record herein, the Court will grant defendants' motion for summary judgment.

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[1] The motion to dismiss is brought by the following defendants: BASF AG, BASF Corporation, Bioproducts Incorporated, Chinook Group Ltd., Chinook Group, Inc., ConAgra, Inc., Daiichi Pharmaceutical Co., Ltd., Daiichi Fine Chemicals, Inc., Daiichi Pharmaceutical Corporation, DCV, Inc., Degussa AG, Degussa Corporation, DuCoa, L.P., E.I.duPont de Nemours & Company, Eisai Co., Ltd., Eisai Inc., F. Hoffmann-La Roche Ltd, Hoffmann-La Roche Inc., Roche Vitamins Inc., Lonza AG, Lonza Inc., Nepera, Inc., Reilly Industries, Inc., Reilly Chemicals, SA, Rhone-Poulenc SA, Rhone-Poulenc Animal Nutrition, Inc., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., UCB, Inc., and UCB Chemicals Corporation.

[2] Defendants advance this motion against all damage claims based on the "umbrella" theory and asserted under §4 of the Clayton Act on the basis of plaintiffs' purchases of any product from non-defendants. Defendants' motion, and therefore this Opinion, does not address claims which would be based on the following: (1) purchases from alleged non-defendant co-conspirators; (2) purchases that satisfy the "cost-plus" exception to the Illinois Brick doctrine; and (3) purchase that satisfy the "owned and controlled" exception to the Illinois Brick doctrine.

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Background

The precise issue before the Court has already been decided in the context of this litigation as to different plaintiffs. On July 2, 2001, this Court issued a Memorandum Opinion ("July 2 Opinion") granting certain defendants' motion for partial summary judgment against six direct action plaintiffs.[3] This Court dismissed plaintiffs' claims as indirect purchaser claims barred by Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and furthermore rejected plaintiffs' argument based upon the "umbrella" theory of liability to recover damages for purchases from defendants' competitors.

Plaintiffs bound by the July 2 Opinion were indirect purchasers of "pre-mix" who had purchased the pre-mix from non-defendant intermediary "blenders."[4] Plaintiffs argued that pre-mix prices of the non-defendant blenders were influenced by the defendants' participation and price fixing in the premix market rather than from the defendants' price fixing of individual vitamin products, and that such participation and price fixing constituted an independent basis for asserting liability against defendants.[5] Plaintiffs contented that but for defendants price fixing

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[3] The July 2 Opinion pertained to two cases in this multidistrict litigation, Blue Seal Feeds, Incl., et al v. Akzo Nobel, Inc., et al., Civ No. 99-3226, and Tyson Foods, Inc., et al. v. Akzo Nobel, Inc., et al., Civ. No. 99-5134. The six plaintiffs whose claims were at issue in the July 2 Opinion were: Benedict Feeding Co., J&J Dairy, Keith Smith Co., Moark Productions, Inc., Reitsma Dairy, and L.L. Murphy Co. Defendants in that motion sought summary judgment as to plaintiffs' Section 4 Clayton Act damage claims, but did not pursue dismissal on plaintiffs' claims for injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26.

[4] "Premix" refers to a blend of straight vitamins and sometimes non-vitamin ingredients. "Blenders" are intermediaries who either blend the straight vitamins into pre-mixes for sale to third parties, or who purchase the pre-mixes for resale to third parties.

[5] Defendants not only sold straight vitamins to pre-mix blenders and third parties, they also actively participated in the pre-mix market as direct sellers to third parties. Plaintiffs claim that due to their size and large market shares, defendants were able to set prices in the pre-mix

at the pre-mix level, plaintiffs would have been able to purchase pre-mix products from the defendants' competitors, the non-defendant blenders, at lower prices than those actually paid by plaintiffs. Plaintiffs claimed that defendants set prices in the intermediary market by reducing the "discount" on pre-mix and therefore forced plaintiffs to pay more to non-defendants than they would have paid absent such price fixing.[6]

This Court, both in its July 2 Opinion and in FTC v. Mylan Laboratories, Inc., 62 F. Supp. 2d 25 (D.D.C. 1999), recognized that the "umbrella" theory is not a valid basis for imposing antitrust liability because it is based on legally speculative and complex theories of proof. See July 2 Opinion at 8 ("[P]laintiffs' umbrella claims are too remote to confer antitrust standing. . . . The causal connection between plaintiffs' injury and the alleged conspiracy is necessarily attenuated by significant intervening factors, such as independent pricing decisions of the nonconspiring suppliers of pre-mix."); Mylan, 62 F. Supp. 2d at 39 ("The main difficulty with the umbrella theory is that, even in the context of a single level of distribution, ascertaining the appropriate measure of damages is a highly speculative endeavor. There are numerous pricing variables which this Court would be bound to consider to approximate the correct measure of damages, including the cost of production, marketing strategy, elasticity of demand, and the price of comparable items."); see also In re Petroleum Products Antitrust Litigation, 691 F.2d 1335, 1340-41 (9th Cir. 1982); Mid-West Paper Products Co. v. Continental Group Inc., 596 F.2d 573, 585 (3d Cir. 1979). Furthermore, the language of this Court in the July 2 Opinion was clear as to

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markets and consequently the smaller blenders had to raise prices in order to remain competitive.

[6] The discount is the difference between what the blenders and third parties pay to the defendants for pre-mix as compared to what they would pay for individual, non-mixed vitamins purchased directly from the vitamin manufacturers.

the Court's view of claims based upon the "umbrella" theory.

> Plaintiffs in this case are seeking to recover damages that may overlap with the claims of the blenders for overcharges. Moreover, even to the extent that plaintiffs are not seeking compensation for overcharges which were passed on to them from the blenders, there are too many intervening factors which would make it impossible to apportion damages between the overcharges and the other factors with any reasonable degree of certainty. Therefore, because plaintiffs' claims for damages under the "umbrella" theory are too speculative, potentially duplicative of the claims of the blenders who are also litigants in this case, and necessarily involving highly complex and theoretical damage calculations, the Court will grant defendants' Motion for summary judgment of these claims.

July 2 Opinion at 10-11.

In the instant motion, defendants now seek dismissal of the remaining claims based on this "umbrella" theory of liability. Pursuant to the July 2 Opinion, this Court will grant defendant's motion for summary judgment.[7]

Discussion

Defendants in this action seek to have 96 indirect purchaser claims[8] dismissed for the following reasons: (1) they are indirect purchaser claims barred by Illinois Brick, and (2) this Court does not recognize the "umbrella" theory as a valid theory of liability to support damages under §4 of the Clayton Act.

Indirect Purchaser Claims

Plaintiffs offer signed declarations as evidence to support their claim that an independent

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[7] This Opinion, denying indirect claims under Illinois Brick and rejecting the "umbrella" theory of liability, shall apply to all indirect purchaser claims pending under the Vitamins Antitrust Litigation which are filed pursuant to Section 4 of the Clayton Act and based upon purchases from non-defendant parties.

[8] Five of the ninety-six plaintiffs who are listed as pursuing "umbrella" theory claims in this action are the same plaintiffs as those dismissed in the July 2 Opinion. See Defs.' Mot. for Summ. J., Ex. D.

conspiracy in the premix market resulted in higher prices and consequently violations of Section 4 of the Clayton Act.[9] Even with the declarations, the Court finds the July 2 Opinion to be clear on the issue of indirect purchaser claims. See July 2 Opinion at 3 ("Regardless of how plaintiffs phrase it, they bought their pre-mix products from companies other than the defendants in this case; therefore, their relationship to these defendants is, by definition, indirect. . . . Whether or not pre-mix products constitute their own markets does not alter the fact that plaintiffs are indirect purchasers of these defendants."). Plaintiffs have made the exact arguments that were made by plaintiffs in the earlier action, and while they have supplemented the arguments with declarations, the Court finds the holding of the July 2 Opinion to be decisive on this issue.

Umbrella Claims

Plaintiffs again mimic the arguments made by the plaintiffs involved in the July 2 Opinion with regard to their "umbrella" theory claims. The Court does not see any differences between the purchases by plaintiffs in this action and the purchases by plaintiffs in that action. They were both indirect purchaser claims premised on the "umbrella" theory of liability, a theory that this Court does not recognize as a valid argument. Therefore, the Court finds the holding set forth in the July 2 Opinion to be decisive on this point, and plaintiffs' argument again must fail.

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[9] See Pls.' Mem. P. & A. Opp'n., Decl. Donald G. Killingsworth, Decl. Jim Weede, and Decl. Charles L. Miller Jr.

Conclusion

For the reasons set forth above and the July 2 Opinion of this Court, defendants' Motion for Summary Judgment is granted. An order will accompany this Opinion.

April 30, 2002

Thomas F. Hogan
Chief Judge